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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 OMAR NAGY,

8 Plaintiff(s),

Case No. 2:16-CV-2095 JCM (GWF)

ORDER

9 v.

10 WESTERN ALLIANCE BANK, dba
11 "BANK OF NEVADA,"

12 Defendant(s).

13
14 Presently before the court is defendant Western Alliance Bank d/b/a Bank of Nevada's
15 ("Bank of Nevada") motion for summary judgment. (ECF No. 32). Plaintiff Omar Nagy filed a
16 response (ECF No. 44), to which defendant replied (ECF No. 47).

17 **I. Facts**

18 In April of 2009, defendant hired plaintiff as a relationship manager in special assets. (ECF
19 No. 32, Ex. A-3). After two and a half years in the position, plaintiff was moved to a position in
20 commercial real estate production. *Id.*

21 In February of 2016, plaintiff began suffering from anxiety caused by workplace stress.
22 (ECF No. 44, Ex. 1). Plaintiff's symptoms included dizziness, headaches, a feeling of
23 helplessness, sleep disturbances, and an inability to concentrate at work. *Id.*

24 On May 20, 2016, plaintiff had an initial visit with Dr. Javaid Anwar ("Dr. Anwar"), a
25 primary care physician. (ECF No. 32, Ex. A-2). Dr. Anwar's notes from the visit included a
26 diagnosis and treatment plan for general anxiety disorder. *Id.* The plan included a prescription for
27 two anti-anxiety medications. *Id.* The plan did not mention work restrictions or limitations. *Id.*

1 Plaintiff was told to schedule a follow-up visit in four weeks for further evaluation and treatment.
2 *Id.*

3 On June 1, 2016, plaintiff visited Dr. Anwar. (ECF No. 44, Ex. 9). The stated reason for
4 the visit was “patient needs an FMLA form filled out because of stress with anxiety disorder.” *Id.*
5 Dr. Anwar’s notes from the visit recommended continuing the May 20, 2016, treatment plan. (ECF
6 No. 32, A-13). The notes did not mention work restrictions or worsening symptoms. *Id.*

7 After plaintiff’s June 1, 2016, visit, Dr. Anwar and his staff completed plaintiff’s FMLA
8 certification form. (ECF No. 32, Ex. A-2). The form stated that plaintiff would require intermittent
9 leave. (ECF No. 44, Ex. 10). Dr. Anwar signed the certification and sent it to defendant on June
10 9, 2016. (ECF No. 44, Ex. 8). Upon receiving the completed form, defendant sent an email to
11 plaintiff acknowledging the request. (ECF No. 32, Ex. A-17).

12 On June 14, 2016, Dr. Anwar prepared a revised FMLA certification form. (ECF No. 44,
13 Ex. 11). The only substantive change to the form was that Dr. Anwar indicated that plaintiff
14 needed block leave instead of intermittent leave. *Id.* The revised form stated that plaintiff needed
15 block leave from June 9, 2016, through August 15, 2016. *Id.*

16 Defendant received plaintiff’s revised FMLA certification form on June 14, 2016. (ECF
17 No. 32, Ex. A-1). On June 17, 2016, defendant sent plaintiff a letter approving the leave along
18 with FMLA documents for plaintiff to complete. (ECF No. 32, Ex. A-19).

19 On June 21, 2016, plaintiff emailed the completed FMLA documents to his attorney. (ECF
20 No. 32, Ex. A-3). Plaintiff’s attorney forwarded the paperwork to defendant. (ECF No. 32, Ex.
21 B-2). The forwarded email included correspondence from plaintiff to his attorney stating that “I
22 want to give you the electronic and actual key to the bank. I am heading out of the country for a
23 month starting the 9th. I hope we can have this wrapped up by then, but in the event it is not – I
24 want you to have the items because they would want them.” *Id.* This correspondence raised a
25 concern over the legitimacy of plaintiff’s approved FMLA leave and his intention of returning to
26 work. (ECF No. 32, Ex. A-1).

27 On July 1, 2016, defendant sent plaintiff a message requesting a meeting. (ECF No. 32,
28 Ex. A-20). On July 5, 2016, after receiving no reply from plaintiff, defendant sent a follow-up

1 email. *Id.* Plaintiff's attorney emailed defendant on July 6, 2016, stating that plaintiff was
2 unavailable to meet that week. *Id.* Plaintiff was unavailable because he was visiting family in
3 Pakistan and traveling from July 9, 2016, through August 3, 2016. (ECF No. 47, Ex. C-3).

4 On July 7, 2016, defendant terminated plaintiff's employment with the company. (ECF
5 No. 32, Ex. A-21). Defendant sent plaintiff a letter providing two reasons for his termination. *Id.*
6 First, the letter referenced plaintiff's failure to disclose a prior outside business interest, in
7 contravention of defendant's code of conduct. *Id.* Second, defendant cited plaintiff's refusal to
8 cooperate with its investigation into his suspected FMLA fraud. *Id.*

9 **II. Legal Standard**

10 The Federal Rules of Civil Procedure authorize summary judgment when the pleadings,
11 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
12 show that "there is no genuine dispute as to any material fact and the movant is entitled to a
13 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is
14 "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317,
15 323–24 (1986).

16 For purposes of summary judgment, disputed factual issues should be construed in favor
17 of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to
18 preclude summary judgment, the nonmoving party must "set forth specific facts showing that there
19 is a genuine issue for trial." *Id.*

20 In determining summary judgment, a court applies a burden-shifting analysis. The moving
21 party must first satisfy its initial burden. "When the party moving for summary judgment would
22 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
23 directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has
24 the initial burden of establishing the absence of a genuine issue of fact on each issue material to
25 its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)
26 (citations omitted).

27 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
28 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential

1 element of the non-moving party's case; or (2) by demonstrating that the nonmoving party failed
2 to make a showing sufficient to establish an element essential to that party's case on which that
3 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
4 party fails to meet its initial burden, summary judgment must be denied and the court need not
5 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
6 60 (1970).

7 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
8 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
9 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
10 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
11 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
12 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
13 631 (9th Cir. 1987).

14 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
15 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
16 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
17 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
18 for trial. *See Celotex*, 477 U.S. at 324.

19 At summary judgment, a court's function is not to weigh the evidence and determine the
20 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
21 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
22 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
23 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
24 granted. *See id.* at 249–50.

25 **III. Discussion**

26 Plaintiff asserts two claims for relief under the Family Medical Leave Act (“FMLA”), 29
27 U.S.C. § 2601 et. seq. (ECF No. 1). Plaintiff claims that defendant (1) interfered with his use of
28 FMLA leave and (2) subsequently retaliated against him for using FMLA leave. *Id.* Defendant

1 moves for summary judgment on both claims. (ECF No. 32). The court will analyze the claims
2 separately.

3 **a. FMLA interference**

4 Under the FMLA, it is unlawful for an employer to “interfere with, restrain, or deny the
5 exercise of or the attempt to exercise any right provided under the FMLA.” 29 U.S.C. § 2615(a)(1).
6 To state a prima facie case of FMLA interference, an employee must establish that “(1) he was
7 eligible for the FMLA’s protections, (2) his employer was covered by the FMLA, (3) he was
8 entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and
9 (5) his employer denied him FMLA benefits to which he was entitled.” *Escriba v. Foster Poultry*
10 *Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014) (quoting *Sanders v. City of Newport*, 657 F.3d
11 772, 778 (9th Cir. 2011)).

12 Here, the parties dispute whether plaintiff was entitled to leave under the FMLA.
13 Therefore, the court will analyze whether the parties raise a genuine dispute as to any material fact.

14 **1. Entitlement**

15 The FMLA provides that “an eligible employee shall be entitled to 12 workweeks of leave
16 during any 12-month period because of a serious health condition that makes the employee unable
17 to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D). Therefore,
18 for plaintiff to establish he was entitled to FMLA leave under this subsection, he must show that
19 (1) he suffered from a serious health condition (2) which made him unable to perform the functions
20 of his position. *See id.*

21 A serious health condition is “an illness, injury, impairment, or physical or mental
22 condition that involves: (A) inpatient care in a hospital or (B) continuing treatment by a health care
23 provider.”¹ 29 U.S.C. § 2611(11). Continuing treatment by a health care provider, as relevant to
24 this matter, includes: (A) a period of incapacity and treatment, or (B) incapacity or treatment due
25 to a chronic serious health condition. *See* 29 C.F.R. § 825.115(a) and (c).

26
27 ¹ The parties mention “medical necessity” as a requisite element for an illness to qualify as
28 a serious health condition. Medical necessity is required for intermittent FMLA leave and is
distinct from the serious health condition requirement. *Compare* 29 U.S.C. § 2612(b)(1), *and* 29
C.F.R. § 825.202(b), *with* 29 U.S.C. § 2612(a)(1)(D), *and* 29 U.S.C. § 2611(11).

1 Continuing treatment based on a period of incapacity and treatment, as defined by the
2 Department of Labor, requires:

3 A period of incapacity of more than three consecutive, full calendar days, and any
4 subsequent treatment or period of incapacity relating to the same condition that also
5 involves: (1) treatment two or more times, within 30 days of the first incapacity,
6 unless extenuating circumstances exist, by a health care provider or (2) treatment
7 by a health care provider on at least one occasion, which results in a continuing
8 treatment under the supervision of the health care provider. The first (or only) in-
person treatment visit must take place within seven days of the first day of
incapacity. The term extenuating circumstances means circumstances beyond the
employee's control that prevent the follow-up visit from occurring as planned by
the health care provider.

9 29 C.F.R. § 825.115(a). Therefore, the threshold inquiry under § 825.115(a) is whether plaintiff
10 suffered a period of incapacity of more than three consecutive, full calendar days. *See id.*; *see also*
11 *Marchisheck v. San Mateo Cty.*, 199 F.3d 1068, 1074 (9th Cir. 1999).

12 Moreover, continuing treatment includes “any period of incapacity or treatment for such
13 incapacity due to a chronic serious health condition.” 29 C.F.R. § 825.115(c). A chronic serious
14 health condition is one which: (1) requires periodic visits for treatment by a health care provider;
15 (2) continues over an extended period of time; and (3) may cause episodic rather than a continuing
16 period of incapacity. *Id.*

17 Incapacity within the FMLA means “inability to work, attend school, or perform other
18 regular daily activities due to the serious health condition, treatment therefore, or recovery
19 therefrom.” 29 C.F.R. § 825.113(b). FMLA plaintiffs are required to show incapacity. *See* 29
20 C.F.R. § 825.115(a) and (c).

21 Here, plaintiff contends that his general anxiety disorder qualifies as a serious health
22 condition either based on a period of incapacity and treatment or due to a chronic serious health
23 condition. (ECF No. 44). Because plaintiff has failed to raise a triable issue on either allegation,
24 the court will grant defendant's motion for summary judgment on plaintiff's FMLA interference
25 claim.

26 Plaintiff argues that his deposition testimony, in which he stated that his anxiety started
27 “interfering with his work” and made him less “proactive on things that I needed to do,” creates a
28

1 dispute as to whether he was incapacitated for more than three consecutive calendar days.² *See*
2 (ECF No. 44, Ex. 1). Yet, plaintiff also stated in his deposition that he could work and reach his
3 goals despite his anxiety. (ECF No. 32, Ex. A-3). Further, Dr. Anwar's notes and treatment plan
4 from plaintiff's May 20, 2016, and June 1, 2016, visits do not mention work limitations or
5 restrictions. *See* (ECF No. 32, Exs. A-12, A-13). Relatedly, on plaintiff's amended FMLA form,
6 Dr. Anwar marked "no" to the question, "is the employee unable to perform his/her job functions
7 due to the condition?" (ECF No. 44, Ex. 11).

8 Therefore, plaintiff has failed to produce sufficient evidence indicating an "inability to
9 work" for a period of more than three consecutive, full calendar days. *See* 29 C.F.R. § 825.113(b);
10 29 C.F.R. § 825.115(a); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th
11 Cir. 2002) (holding that no genuine issue exists when the only evidence presented is
12 uncorroborated and self-serving testimony). Accordingly, plaintiff was not entitled to FMLA
13 leave based on a period of incapacity and treatment. *See* 29 C.F.R. § 825.115(a).

14 Plaintiff additionally contends that he qualified for FMLA leave due to a chronic serious
15 health condition. (ECF No. 44). Plaintiff's amended FMLA form indicates that he will require
16 treatment visits at least twice per year, that his condition is likely to be lifelong, and that his
17 condition will cause episodic flare-ups. (ECF No. 44, Ex. 11). Therefore, plaintiff argues that he
18 has presented sufficient evidence indicating that his general anxiety disorder is a chronic serious
19 health condition. *See* 29 C.F.R. § 825.115(c).

20 Here, plaintiff has failed to set forth evidence of continuing treatment due to a chronic
21 serious health condition, as he has failed to present evidence showing that his anxiety resulted in
22 a period of incapacity. *See* (ECF No. 44); *see also* 29 C.F.R. § 825.115(c). Plaintiff stated in his
23 deposition that he could still do his job and reach his goals despite his anxiety. (ECF No. 32, Ex.
24 A-3). Additionally, Dr. Anwar indicated that plaintiff was able to perform all work functions on
25 plaintiff's amended FMLA form. (ECF No. 32, Ex. A-16).

26
27 ² Plaintiff has not specifically alleged when the relevant three consecutive, full calendar
28 days of incapacity occurred in his complaint or response. *See* (ECF Nos. 1, 44); *see also* 29 C.F.R.
§ 825.115(a). Furthermore, plaintiff has failed to provide sufficient evidence suggesting a period
of incapacity on any of the relevant dates.

1 Further, plaintiff's activities during his FMLA leave suggest that he was not incapacitated.
2 See (ECF No. 32, Ex. A-3). Plaintiff traveled from Las Vegas, Nevada, to Lahore, Pakistan, to
3 visit family.³ See (ECF No. 47, Ex. C-3). He also completed his transfer from William Mitchell
4 Law School to UNLV Boyd School of Law on June 28, 2016. Accordingly, plaintiff was not
5 entitled to FMLA leave due to a chronic serious health condition. See 29 C.F.R. § 825.115(c); see
6 also *Marchisheck*, 199 F.3d at 1074.

7 **b. FMLA retaliation**

8 Under the FMLA, it is unlawful “for any employer to discharge or in any other manner
9 discriminate against any individual for opposing any practice made unlawful under the FMLA.”
10 29 U.S.C. § 2615(a)(2); see *Loncar v. Penn Nat’l Gaming*, No. 2-13-cv-02218-JAD-GWF, 2015
11 WL 5567277, at *3 (D. Nev. Sept. 22, 2015).

12 29 U.S.C. § 2615(a)(2) does not cover visiting negative consequences on an employee
13 simply because he used FMLA leave. See *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124
14 (9th Cir. 2001). Such action is covered under 29 U.S.C. § 2615(a)(1). See *id.* Therefore, when a
15 plaintiff alleges retaliation for using FMLA leave, courts construe the claim as one for interference
16 under § 2615(a)(1). See, e.g., *Loncar*, 2015 WL 5567277, at *4.

17 Here, plaintiff's retaliation claim is based on the allegation that he was terminated because
18 he took FMLA leave. (ECF No. 1). Defendat argues that plaintiff's retaliation claim should be
19 treated as an interference claim. (ECF No. 32 at 24).

20 In his response, plaintiff argues that he opposed defendant's interference with his FMLA
21 rights and suffered an adverse employment action as a result. (ECF No. 44 at 21). He asserts that
22 “defendant did not comply with his request that all FMLA related communication from defendant
23 be sent to plaintiff's attorney.” *Id.* However, plaintiff provides no legal authority suggesting that
24 the FMLA provides the right to have all communications flow through an attorney. See *id.*

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26
27 ³ Plaintiff stayed with his family in Pakistan from July 10, 2016 to July 23, 2016. (ECF
28 No. 32, Ex. A-3). Plaintiff's return trip to Las Vegas, Nevada, included multiday stops in Paris,
France, and Barcelona, Spain. See (ECF No. 47, Ex. C-3). Plaintiff returned to Las Vegas on
August 3, 2016. See *id.*

Therefore, the court will treat plaintiff's retaliation claim as a § 2615(a)(1) interference claim. *See Loncar*, 2015 WL 5567277, at *4. Accordingly, because the court concludes that plaintiff was not entitled to leave under the FMLA, defendant is entitled to summary judgment on plaintiff's retaliation claim. *See id.*; *see also Bachelder*, 259 F.3d at 1124.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion for summary judgment (ECF No. 32) be, and the same hereby is, GRANTED.

The clerk shall enter judgment accordingly and close the case.

DATED June 22, 2018.

James C. Mahan
UNITED STATES DISTRICT JUDGE